

[Criminal Tax Manual](#)

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11.00 FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE

OR FAILURE TO SUPPLY INFORMATION

11.01 STATUTORY LANGUAGE: 26 U.S.C. § 7205(a)

§7205. Fraudulent withholding exemption certificate or failure to supply information

(a) ***Withholding on wages.*** -- Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined . . . , or imprisoned not more than 1 year, or both.¹

11.02 TAX DIVISION POLICY

Section 7205 is used only rarely. The filing of a false Form W-4 generally will be charged as an affirmative act in a § 7201 tax evasion felony prosecution rather than as a misdemeanor under § 7205. Section 7205 may be used only in those cases in which the government cannot prove tax evasion or in those situations in which there are significant mitigating circumstances, the defendant cooperates fully, satisfies all tax liabilities, and assists in the criminal prosecution of a promoter of tax fraud. See [USAM 9-27.300](#), Principles of Federal Prosecution -- Selecting Charges -- Charging Most Serious Offenses.

11.03 GENERALLY

Section 7205(a) is directed at employees who attempt to thwart the income tax wage withholding system by submitting false Forms W-4 to their employers.² As noted

¹ . The maximum permissible fine for offenses under Section 7205(a) is at least \$100,000 for individuals. Alternatively, if the offense resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. See 18 U.S.C. § 3571.

² An employer who is required to furnish withholding statements to employees but who willfully furnishes false or fraudulent statements, or who willfully fails to furnish

above, however, the government generally will charge the filing of a false or fraudulent Form W-4 as an affirmative act in a *Spies*-evasion felony prosecution rather than bringing a misdemeanor section 7205 charge. *See, e.g., United States v. King*, 126 F.3d 987, 989-90 (7th Cir. 1997); *United States v. Connor*, 898 F.2d 942, 944 (3rd Cir. 1990); *United States v. Foster*, 789 F.2d 457, 460-61 n.4 (7th Cir. 1986). *See* [Section 8.06\[1\]](#), *supra*, discussing *Spies*-evasion and false Forms W-4, and [Section 40.05\[2\]](#), *infra*, *Tax Defiers*. Nevertheless, in appropriate cases, a Section 7205 charge is available. *See, e.g., Foster*, 789 F.2d at 460-61 (charging violations of sections 7201 and 7205); *United States v. Copeland*, 786 F.2d 768, 770-71 (7th Cir. 1986) (same).

11.04 ELEMENTS OF SECTION 7205(a)

To establish a violation of section 7205(a), the following elements must be proved beyond a reasonable doubt:

1. The defendant was required to furnish an employer with a signed withholding exemption certificate (Form W-4) relating to the number of withholding exemptions claimed;
2. The defendant supplied his or her employer with a signed withholding statement;³
3. The information supplied to the employer on the signed withholding statement was false or fraudulent;
4. The defendant acted willfully.

See United States v. Herzog, 632 F.2d 469, 471-72 (5th Cir. 1980); *United States v. Olson*, 576 F.2d 1267, 1271 (8th Cir. 1978).

statements, may be prosecuted under 26 U.S.C. § 7204, which is not separately treated in this manual.

³ . The discussion in this section is limited to the supplying of false or fraudulent information. However, Section 7205(a) also makes it a crime to willfully fail to supply an employer with a signed withholding exemption certificate.

11.05 DUTY TO COMPLETE AND FILE FORM W-4

An employee's duty to supply an employer with information relating to the number of withholding exemptions claimed arises under Section 3402 of Title 26, which provides: "On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled." 26 U.S.C. § 3402(f)(2)(A).

The defendant's status as an employee is an essential element of the offense that the government must prove beyond a reasonable doubt. *See United States v. Bass*, 784 F.2d 1282, 1284 (5th Cir. 1986); *United States v. Herzog*, 632 F.2d 469, 472 (5th Cir. 1980); *United States v. Johnson*, 576 F.2d 1331, 1332 (8th Cir. 1978); *United States v. Pryor*, 574 F.2d 440, 442 (8th Cir. 1978).

Proof that the defendant is an employee should present little difficulty, because the defendant's filing of the Form W-4 constitutes the defendant's admission of being an employee. *See* Fed. R. Evid. 801(d)(2); 26 U.S.C. § 6064. Moreover, the records and testimony of the employer, including the Forms W-2 and payroll records, provide the necessary evidence of the defendant's status as an employee.

The precise date of the filing of the Form W-4 is not an essential element of a violation of Section 7205. *See Johnson*, 576 F.2d at 1332; *see also Pryor*, 574 F.2d at 442.

11.06 FALSE OR FRAUDULENT INFORMATION

Section 7205(a) proscribes providing false *or* fraudulent information on a Form W-4. The government must thus establish that the withholding form that was filed was false or fraudulent. *See United States v. Hinderman*, 625 F.2d 994, 995-96 (10th Cir. 1980); *United States v. Buttorff*, 572 F.2d 619, 625 (8th Cir. 1978); *United States v. Peterson*, 548 F.2d 279, 280 (9th Cir. 1977); *United States v. Smith*, 484 F.2d 8, 10 (10th Cir. 1973); *United States v. Malinowski*, 472 F.2d 850, 852-53 (3d Cir. 1973).

"'False' means more than merely 'incorrect,'" but Section 7205 does not require that a statement be "false in the sense of deceptive." *United States v. Hinderman*, 528 F.2d 100, 102 (8th Cir. 1976) (internal quotation omitted); *see also United States v.*

Lawson, 670 F.2d 923, 928 (10th Cir. 1982); *United States v. Hudler*, 605 F.2d 488, 490 (10th Cir. 1979) (“The criterion is not whether the employer and the government were, or could have been, deceived”); *but see United States v. Snider*, 502 F.2d 645, 655 (4th Cir. 1974) (“in order for a taxpayer to be convicted of supplying ‘false or fraudulent’ information contrary to section 7205 the information must either be (1) supplied with an intent to deceive, or (2) false in the sense of deceptive -- of such a nature that it could reasonably affect withholding to the detriment of the government”).

The Form W-4 filed by a defendant typically is asserted to be false or fraudulent insofar as it claims either an excessive number of withholding allowances or exemption from withholding. *See, e.g. United States v. Cree*, No. 94-10574, 1995 WL 465792, at *2 (9th Cir. Aug. 2, 1995). In *United States v. McDonough*, 603 F.2d 19 (7th Cir. 1979), the defendant argued that the government failed to prove beyond a reasonable doubt the number of exemptions to which the defendant actually was entitled. The Seventh Circuit ruled that the government need only establish that the information supplied was false or fraudulent:

Proof of falsehood does not, however, require a showing of what is true. The evidence in this case contains many reasonable inferences that the information given by the defendant was untrue. The testimony of the IRS agent, together with the other evidence, was sufficient for the jury reasonably to conclude beyond a reasonable doubt that the information was false. That the agent's testimony did not establish beyond a reasonable doubt that the defendant was entitled to a certain number of exemptions is immaterial.

McDonough, 603 F.2d at 24; *see also United States v. Peister*, 631 F.2d 658, 664-65 (10th Cir. 1980) (whether taxpayer is exempt from tax is a “collateral issue” not essential to establishing a violation of 26 U.S.C. § 7205; all that is required is proof that taxpayer presented a false or fraudulent Form W-4).

As noted, one way in which a taxpayer may violate Section 7205 is to falsely claim an exemption from withholding. Instructions on Forms W-4 require the employee to read the certificate to determine whether the employee can claim exempt status. The Form W-4, at line 7, requires the employee to certify the following before claiming exempt status:

I claim exemption from withholding for [YEAR], and I certify that I meet **both** of the following conditions for exemption.

- Last year I had a right to a refund of **all** federal income tax withheld because I had **no** tax liability **and**
- This year I expect a refund of **all** federal income tax withheld because I expect to have **no** tax liability.⁴

(Emphasis in original). *See also* 26 U.S.C. § 3402(n) (employer not required to deduct and withhold any tax upon wages if a Form W-4 certifies that the employee (1) incurred no tax for the prior year and (2) anticipates no tax liability for the current year).

In cases in which the defendant has claimed to be exempt, the government often can introduce a tax return for the prior year that reflects a tax liability. The prior year tax return serves as an admission that the defendant knew he or she owed federal income tax “last year” and thereby knowingly filed a false Form W-4 in the prosecution year. Alternatively, computations of the defendant’s taxable income and income tax liability for each of the years in question may be introduced to demonstrate the false or fraudulent nature of the exempt Form(s) W-4 filed. The fact that aggregate withholding in a particular year exceeds an individual’s income tax liability for that year *does not* alter the fact that a tax liability for that year exists. *United States v. Echols*, 677 F.2d 498, 499 (5th Cir. 1982); *United States v. Hinderman*, 528 F.2d at 101; *see also* Treas. Reg. § 31.3402(n)-1, ex. 3 (2007) (“Assume [Employee A, an unmarried, calendar-year basis taxpayer, files his income tax return for 2005 on April 10, 2006. Also assume] . . . that for 2005 A has taxable income of \$8,000, income tax liability of \$839, and income tax withheld of \$1,195. Although A received a refund of \$356 due to income tax withholding of \$1,195, he may not certify on his withholding exemption certificate that he incurred no liability for income tax imposed by subtitle A for 2005”).

An administrative assessment under 26 U.S.C. § 6201 is not required before an individual can have a tax liability. *See, e.g., United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988); *United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985). Furthermore, the government need not prove that an employer relied on the forms submitted. *United States v. Thomas*, 788 F.2d 1250, 1254 (7th Cir.1986) (“Section 7205 forbids the filing of ‘false’ forms . . . and reliance on the forms is not an element of the offense”).

⁴ Form W-4 was amended in 1994 to its current language.

11.07 WILLFULNESS

11.07[1] Generally

Willfulness for purposes of a Section 7205 prosecution is the same as it is in all specific intent criminal tax offenses -- "a voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 194 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Flitcraft*, 803 F.2d 184, 186-87 (5th Cir. 1986); *United States v. Ferguson*, 793 F.2d 828, 830-31 (7th Cir. 1986); *United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985); *United States v. Grumka*, 728 F.2d 794, 796 (6th Cir. 1984); *United States v. Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980); *United States v. Rifien*, 577 F.2d 1111, 1113 (8th Cir. 1978); *United States v. Olson*, 576 F.2d 1267, 1272 (8th Cir. 1978).

Whether the defendant had a good faith misunderstanding of the law, as opposed to a disagreement with the law, is a jury question. See *United States v. Schiff*, 801 F.2d 108, 112 (2d Cir. 1986); *United States v. Turner*, 799 F.2d 627, 629 (10th Cir. 1986). A jury may not be told that a defendant's claimed misunderstanding of the law must be objectively reasonable to constitute a defense. *Cheek*, 498 U.S. at 203; see also *Flitcraft*, 803 F.2d at 187; *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985). However, a separate instruction on good faith is unnecessary in a criminal tax case if the trial court adequately instructs the jury on willfulness. See *Cheek*, 498 U.S. at 201; *United States v. Pomponio*, 429 U.S. 10, 13 (1976); *United States v. Hardy*, 941 F.2d 893, 897 (9th Cir. 1991). See also the discussion of willfulness in Sections [8.08](#), *supra*, and [40.04](#), *infra*.

11.07[2] Examples: Proof of Willfulness

1. Evidence that prior to the year in which he falsely claimed nine exemptions, the defendant had filed tax returns, had paid his taxes, and had not claimed any exemptions; the Form W-4 filed by the defendant clearly showed that he was entitled to no more than two exemptions; and the defendant testified that he claimed nine exemptions to "zero out" his tax liability. *United States v. Cree*, No. 94-10574, 1995 WL 465792 at *2 (9th Cir. Aug. 2, 1995).
2. Evidence that the defendant had a tax liability in a prior year and then filed a Form W-4 in which

99 exemptions were claimed, as well as a document that falsely declared he had no tax liability in the prior year and anticipated none in the year in issue. *United States v. Arlt*, 567 F.2d 1295, 1298 (5th Cir. 1978); *United States v. Grumka*, 728 F.2d 794, 797 (6th Cir. 1984) (filing a Form W-4 claiming total exemption from federal income taxes).

3. The filing of returns on which defendant “did not enter dollar amounts where financial information was required but rather entered the word ‘none,’ an ‘asterick’ [sic] or ‘I OBJ 5th Amend,’” and notice by the IRS that the returns were invalid. *Grumka*, 728 F.2d at 796-97.
4. “Both the failure to file a return and the failure to pay taxes show a general motive to avoid taxes which makes it more likely that the defendant willfully filed fraudulent withholding exemption claims.” *United States v. McDonough*, 603 F.2d 19, 23 (7th Cir. 1979).
5. The large number of exemptions claimed and the increase in the number of exemptions claimed as defendant’s income increased. *McDonough*, 603 F.2d at 24.
6. Evidence of prior tax-paying history and of attempts by the IRS to explain legal requirements to the defendant is sufficient to sustain the jury's finding that the defendant was aware of his legal obligations and intentionally chose not to comply. *United States v. Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978) (in addition to letters from IRS explaining legal requirements, defendant’s employer attempted to explain legal requirements to defendant); *United States v. Foster*, 789 F.2d 457, 461-62 (7th Cir. 1986).
7. Defendants, husband and wife, filed Forms W-4 for prior years claiming five withholding allowances. Three days after the husband attended a tax defier seminar, both husband and

wife changed their withholding certificates to claim a total of 28 withholding allowances. Defendants gave "vague answers" to their employers when questioned about the "sudden increase" in the number of claimed allowances and made no claim at trial that they expected to have 28 allowances. *United States v. Anderson*, 577 F.2d 258, 260-62 (5th Cir. 1978).

8. A defendant's "expressed moral and religious convictions against the payment of income taxes." *United States v. Reed*, 670 F.2d 622, 623 (5th Cir. 1982) ("Evidence of a person's philosophy, motivation, and activities as a tax protester is relevant and material to the issue of intent"); *see also Foster*, 789 F.2d at 462 (evidence that defendant sent tax defier materials to the IRS support finding that defendant acted willfully).
9. Defendant's filing of "Affidavits of Revocation" stating that she was not required to file returns or pay taxes, and letter to IRS stating that wages are not income are evidence of willfulness. *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir. 1986).

11.08 VENUE

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." U.S. Const. amend VI; *see also* Fed. R. Crim. P. 18 (trial proper "in a district where the offense was committed"). *See also* the discussion of venue in [Section 6.00](#), *supra*.

In a Section 7205 prosecution, venue is proper in the judicial district in which the false Form W-4 is submitted to the defendant's employer. *See United States v. Anderson*, 328 U.S. 699, 703 (1946) (absent statutory provision establishing the place of committing a crime, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it"). When a defendant is charged with evasion under Section 7201 and the filing of a false or fraudulent Form W-4 is an affirmative act of evasion, "venue is proper where a false withholding statement is prepared and signed,

where it is received and filed, or where an attempt to evade otherwise occurred.” See *United States v. Felak*, 831 F.2d 794, 799 (8th Cir. 1987).

11.09 STATUTE OF LIMITATIONS

The statute of limitations for Section 7205 offenses is three years from the date the false or fraudulent Form W-4 is filed. 26 U.S.C. § 6531. The three-year limitations period can pose difficulties in charging Section 7205 in conjunction with other tax offenses that have a six-year statute of limitation (*e.g.*, 26 U.S.C. §§ 7201, 7203, 7212(a)).